



A P P E A R A N C E S:

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Assured Guaranty Municipal Corp.

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Rose, for the Financial Oversight and Management Board for  
Puerto Rico (FOMB).

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party AAFAF.

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Syncora Guarantee Inc.

LUC DESPINS, ESQ., Paul Hastings LLP, for Official  
Committee of Unsecured Creditors.

P R O C E E D I N G S

COURTROOM CLERK: United States District Court for the District of Massachusetts is now in session, the Honorable Judge Dein presiding. Today is Tuesday, February 26, 2019. The matter of In Re: The Financial Oversight and Management Board for Puerto Rico as representatives of Puerto Rico Electric Power Authority, case number 17-BK-4780, will now be heard. Will the parties please identify themselves for the record.

MS. DALE: Your Honor, Margaret Dale for the Financial Oversight Management Board as representative of the debtor PREPA.

MS. STAFFORD: Your Honor, Laura Stafford as representative of the Financial Oversight and Management Board as representative of PREPA.

MS. PAVEL: Your Honor, Ashley Pavel of O'Melveny & Myers on behalf of AAFAF.

MR. NATBONY: Good afternoon. William Natbony on behalf of Assured Guaranty Municipal Corp., Assured Guaranty Corp., and will also be speaking primarily on behalf of the other insurers this afternoon.

MR. HAWKINS: Okay. Good afternoon, Your Honor. Howard Hawkins from Cadwalader, also for Assured Guaranty.

MS. HALSTEAD: Ellen Halstead of Cadwalader, also for Assured.

1 MR. DESPINS: Good morning, Your Honor. Luc Despins  
2 Paul Hastings, counsel for the Official Committee in the PREPA  
3 case.

4 MR. WORENKLEIN: Elie Worenklein from Debevoise &  
5 Plimpton on behalf of Syncora Guarantee.

6 MR. BEREZIN: Good afternoon, Your Honor. Robert  
7 Berezin for National Public Finance Guarantee Corp.

8 THE COURT: Welcome, everybody. Welcome, everybody  
9 here in Boston and those in New York and Puerto Rico as well.  
10 I will not repeat the instructions for appropriate behavior in  
11 the courtroom. You have it all memorized by now.

12 And I see that we did time it right today, that it's  
13 not snowing, it's not windy. Everybody flew in from wherever  
14 they were supposed to be. So hopefully we'll have an efficient  
15 and productive afternoon here.

16 I'm going to ask counsel to just keep in mind, I  
17 guess, to make sure that we follow what's been redacted and  
18 unredacted. It's kind of hard to keep track of that. And I  
19 assume that there are some people who are participating who  
20 have actually not seen some of the unredacted declarations. So  
21 if you feel that the court is straying or if counsel is  
22 straying, just make sure that that's known.

23 All right. I will hear from the Oversight Board to  
24 begin with, and I would like you to address, if you think it's  
25 relevant, the fact that the newly filed expert reports, whether

1 that changes the argument at all.

2 MS. DALE: Thank you, Your Honor. Your Honor,  
3 Margaret Dale, for the Financial Oversight and Management  
4 Board.

5 First of all, Ms. Stafford and I are going to split  
6 the argument. I'm going to start with why the insurers should  
7 be compelled to produce the loss reserve information that they  
8 submitted to the New York regulator relating to the PREPA  
9 bonds, including why loss reserves are relevant to collateral  
10 valuation, and Ms. Stafford is going to address the privilege  
11 arguments that the insurers have raised to block the disclosure  
12 of loss reserve information. That's how we're going to split  
13 it up.

14 Just to address your first question regarding the  
15 declarations that were filed yesterday, we took a very quick  
16 look at them. We don't think that they change this motion at  
17 all. There was no additional collateral valuation material  
18 submitted with those declarations that relate to the value of  
19 secured collateral on the date of the petition here and  
20 thereafter. There are some arguments made about collateral  
21 value. They again relate to claims of mismanagement  
22 predominantly, but I don't think that they make any difference  
23 with respect to this motion, Your Honor.

24 THE COURT: Okay. The other thing I would like, I  
25 think the relevance argument is really very critical to me,

1     okay?

2             MS. DALE:    Sure.

3             THE COURT:   So we need to spend some time on that.

4             MS. DALE:    Yes, ma'am.

5             THE COURT:   And in your argument, addressing to the  
6     extent you can, responding to the declarations, how they  
7     describe how the reserves are created, your reply brief didn't  
8     seem to take that head-on.   Okay?

9             MS. DALE:    Sure.   So Your Honor, the relevance of the  
10    collateral valuation documents to the receiver motion we think  
11    is indisputable.   And this relates to why we think the loss  
12    reserve documents are important, because we think they are  
13    relevant to collateral valuation.

14            The starting point is the First Circuit's decision on  
15    the initial receiver motion.   There, that the court held that  
16    in order to lift the automatic stay on the ground of lack of  
17    adequate protection, the moving party must demonstrate the  
18    value of its secured collateral on the petition date and that  
19    the collateral is declining in value.

20            The insurers acknowledge this.   In paragraph 13 of  
21    their opposition, they cite the First Circuit's decision  
22    regarding, quote, "The importance of assessing the pre-petition  
23    value of the bondholders' collateral (if any) and whether the  
24    bondholders face a threat of uncompensated diminution in such  
25    value."

1 THE COURT: So you're not -- is it your argument that  
2 the First Circuit has dictated that or you're just saying  
3 that's one of the points that the First Circuit has suggested  
4 that the reviewing court decide?

5 MS. DALE: I think what we're saying is that that is  
6 the standard upon which a motion for lack of adequate  
7 protection has to meet. So you have to prove that you had  
8 secured collateral of some value on the petition date and that  
9 it has diminished in value over time. We think that that is  
10 basically a burden that the movants here need to satisfy given  
11 the motion that they have brought. And that is why we think  
12 this information that we're seeking now is critical.

13 THE COURT: All right. But the First Circuit raised a  
14 number of suggested -- I guess what I'm saying is I don't think  
15 the motion to compel is the place we would determine the  
16 appropriate standard.

17 MS. DALE: I agree with that.

18 THE COURT: And I gather there would be a fight over  
19 what the appropriate considerations are, maybe.

20 MS. DALE: I'm not sure, because I did quote you from  
21 their brief at page 13, so it seemed like at least we were on  
22 the same page about what the First Circuit said.

23 So, as we said, the insurers have put the value of  
24 their collateral on center stage through the proceeding that  
25 they commenced to lift the stay. The threshold issue here is

1 whether there was any PREPA property in existence on the  
2 submission date subject to a security interest that has  
3 diminished in value and then the extent of any diminution. If  
4 they can't make that showing, if the insurers can't make that  
5 showing, we think that they can't meet the threshold issue on  
6 the lift-stay motion, and we should not be put to the expense  
7 and time of the discovery and the hearing on the lift-stay  
8 motion.

9 Today what we're here for is the insurers' failure to  
10 produce documents that we say comply with the First Circuit's  
11 directive. They have not identified in their lift-stay motion  
12 the value of the collateral on the petition date that they say  
13 is diminishing. They have failed in discovery to produce any  
14 documents to that effect, and they have failed in response to  
15 this motion to do so. There's no description of the collateral  
16 in existence on the petition date. There are no Bates numbers  
17 that have been provided to us as to any responsive documents.  
18 We see general, vague generalities about collateral in what we  
19 understand their answer to be to the First Circuit directive,  
20 which we don't think is a fair answer, but their answer is that  
21 the collateral is a contractual pledge of an income stream,  
22 PREPA's revenues after the petition date, which they allege is  
23 being impaired because of the alleged mismanagement at PREPA.

24 We think that's wrong as a matter of law, but that's  
25 not the issue that we're here today about. The issue that



1 we're here today about, saying it again, is the obligation to  
2 produce documents that identify and value the collateral  
3 existing on the petition date.

4 THE COURT: So you've all identified the collateral,  
5 though, as being the revenue stream.

6 MS. DALE: We have not. That is what the --

7 THE COURT: So what do you say that the collateral is?

8 MS. DALE: We say that the collateral -- it's  
9 complicated, Your Honor, and we certainly will get to this in  
10 the opposition to lift-stay motion. But we think secured  
11 collateral is actually only monies on deposit in a particular  
12 fund pursuant to the trust agreement. It's called the sinking  
13 fund. And we will explain all of this, but we believe that is  
14 the only secured collateral that the insurers had on the  
15 petition date, July 2, 2017, and that money is still there. So  
16 our argument is you're completely secured, there's been no  
17 diminution in the value of your security collateral.

18 THE COURT: So for discovery purposes, though, that's  
19 information that you have, right?

20 MS. DALE: Correct.

21 THE COURT: You have access to the account, and that's  
22 not something that you would expect the movants to produce  
23 documents on?

24 MS. DALE: Unless they had non-privileged documents.  
25 We've given them documents relating to that information, so

1 they might be giving it back to us in discovery. But yeah,  
2 that is information that we or PREPA would have.

3 THE COURT: Okay.

4 MS. DALE: But that's just our side of the argument,  
5 Your Honor. Their argument is their collateral is -- I don't  
6 know. They haven't really completely identified very carefully  
7 what they claim their secured collateral is. And that's part  
8 of what we were doing in discovery, was trying to pin them down  
9 as to what collateral do you say was secured as of the petition  
10 date, what was its value as of the petition date, what was the  
11 value as of the date you brought the lift-stay motion, so we  
12 can decide whether we agree that you need adequate protection  
13 or you are adequately protected.

14 As I said, we didn't come, we didn't start this  
15 discovery looking for loss reserve information, Your Honor. We  
16 started this discovery with document request number 1, which is  
17 Exhibit A to our moving papers, seeking documents showing as of  
18 June 30, 2017 and afterwards the value of your collateral, as  
19 that term is used in the lift-stay motion and the draft  
20 complaint. And each of the insurers said we'll produce to you  
21 non-privileged information responsive to request number one,  
22 essentially.

23 And then over time we were asking them, where are the  
24 documents that reflect the valuation of your collateral. And  
25 after months of not getting any documents responsive to that,

1 we pursued the production of the loss reserve documents, which  
2 was request number 21 to our discovery request, because we  
3 think that's the only place now where we're going to be able to  
4 get some indication of how they were valuing their collateral.

5 So let me answer your first question to me, which was  
6 discuss the relevance of loss reserve information to collateral  
7 valuation and then how the declarants sort of describe it, how  
8 they arrive at their loss reserve information that we're  
9 seeking.

10 So while on the one hand the insurers claim that loss  
11 reserves are completely irrelevant to collateral valuation, on  
12 the other, they concede that the loss reserves have probative  
13 value, and that is their opposition, paragraph 1. They contend  
14 that the probative value is minimal. But again, that is simply  
15 their view, and we think that -- well, we don't know because we  
16 haven't seen them, so we're hard pressed.

17 And in this respect, Your Honor, it may be that an in  
18 camera inspection is another way to sort of -- for the court to  
19 look at this. Loss reserves are by definition the measure of  
20 what the insurers need to put aside to satisfy existing  
21 insurance obligations net of their collateral. That is the  
22 definition of loss reserves. So we're hard pressed to think  
23 how loss reserve information that they supplied to their  
24 regulator cannot at least reflect that in some way. And again,  
25 as I said --

1 THE COURT: So they've described to you how they've  
2 set it up. They've described to you in general terms and more  
3 specific terms in the declaration how the loss reserve is  
4 created and the assumptions that are made which, to paraphrase,  
5 I think I can go into, that you're not -- that PREPA is not  
6 paying anything right now. Let's start with that. And that  
7 they need to have enough money to reserve for PREPA not paying  
8 for X amount of time. And the question of how much time that  
9 is is their estimate of how long the Title III will take.  
10 That's one portion of it, all right?

11 MS. DALE: Yeah.

12 THE COURT: So accepting that they said to you that's  
13 part of what we're doing, why do you think that that  
14 reflects --

15 MS. DALE: Yes, I get it.

16 THE COURT: -- the collateral?

17 MS. DALE: I'm sorry if I'm going to repeat myself.  
18 Two reasons. One, because they indicate in their opposition  
19 that the loss reserve information has probative value here.

20 THE COURT: You need to understand what that probative  
21 value is.

22 MS. DALE: Exactly. Aren't we in a position, as the  
23 debtor's representative here, to be able to evaluate that for  
24 ourselves?

25 And as I said, secondly, the New York law, the New

1 York insurance law -- this is at page 8 of our reply brief --  
2 requires that insurers, quote, "maintain loss reserves net of  
3 collateral." So they tell us that they're submitting this  
4 information to their regulators quarterly, regularly. So are  
5 they saying that they're not -- you know, that they're not  
6 following what the mandate is for what they're supposed to be  
7 submitting?

8 I haven't seen the information, Your Honor. I've  
9 attached as Exhibit A or Appendix A to our reply brief, we put  
10 the publicly filed portion of the publicly filed financial  
11 statement of MBIA, National's parent, just to show that they do  
12 put out loss reserve information publicly. I know that in the  
13 declarations they said we don't do it down to the level of each  
14 credit or each bond that they're insuring, but they do give  
15 that information to their regulator.

16 And so is it just numbers? What is it that they're --  
17 how are those numbers of what the loss reserve -- under all  
18 these scenarios, how are those numbers disclosing potentially  
19 privileged input or advice? If it's just numbers, we don't  
20 think that's privileged information, and we don't think that a  
21 number is going to disclose any kind of privilege of what went  
22 into that number. Ms. Stafford is going to discuss the  
23 privilege issues more.

24 THE COURT: What does that do for you? What does that  
25 do for you if they gave you a number without an explanation?

1 MS. DALE: Well, I don't know, but it might be helpful  
2 for us to understand because we think that we know what PREPA,  
3 what the secured -- the value of their secured collateral was  
4 on a certain date. We think we know that. We have an opinion  
5 about that. We say it's the money that was in the sinking  
6 fund. They don't agree with us. So we'd like to understand  
7 how are they looking at it? What are they valuing? What do  
8 they think is the secured property of PREPA that they're  
9 entitled to adequate protection on? That's the whole lift-stay  
10 motion that we're going through an awful lot of discovery and  
11 depositions and briefing on for a full-blown hearing in May.  
12 And I think this collateral valuation issue is like the  
13 threshold issue for that motion.

14 So they haven't given us any collateral valuation  
15 information. Maybe they should be precluded then from  
16 supplying anything going forward if you determine that we're  
17 not entitled to this information in the loss reserves, and the  
18 record will be where the record will be. And that will be the  
19 end of that.

20 THE COURT: So the expert reports that they produced  
21 included some financial information about the revenues and  
22 expenses that were anticipated. It sounds to me like what they  
23 put forward, at least in this morning in my brief reading was,  
24 we're going to argue that the fiscal plan should be implemented  
25 or that PREPA says that the fiscal plan should be implemented

1 and PREPA can't do it with its current management and that we  
2 will accept, for at least present purposes, PREPA's analysis as  
3 to the benefits of that fiscal plan. You know, and then they  
4 have an analysis as to the savings or the benefits of  
5 implementing the fiscal plan.

6 That's how they're presenting their lift-stay motion.  
7 I think it requires experts. They've given you their experts.  
8 They've given you their analysis. Where I'm kind of stuck is I  
9 think you're just presenting different standards for when is a  
10 receiver appropriate, and I think you fight that out in  
11 connection with the lift-stay motion.

12 MS. DALE: We're trying to fight that out in  
13 connection with the lift-stay motion, but I think that we're  
14 entitled to discovery of how they value their collateral,  
15 whatever they think it is.

16 THE COURT: But that's not what they're arguing.

17 MS. DALE: But that's the -- sorry.

18 THE COURT: You're arguing, you're saying this is  
19 something that you could argue, we don't think that's the right  
20 standard, or, we think the collateral is just this one account,  
21 so this is the information that we have. But if the movants --  
22 I'm sorry, but this is where I'm stuck, I'll be honest with  
23 you. If this is where the movants are not saying, they're not  
24 saying we have X number of revenue, we had X number of net  
25 revenues on day 1 and on day 15 we had this and on day 60 we

1 had that. It's not what they're arguing. So why do you --  
2 one, why do you get that information if they're not arguing it.  
3 And two, they've also told you that that number isn't part of  
4 their loss reserve calculation.

5 MS. DALE: Your Honor, the termination of the  
6 lift-stay motion for a lack of adequate protection, there is a  
7 standard that is applied. And while the insurers can argue  
8 that mismanagement is a cause of diminution and the like, that  
9 is not what the law requires them to show.

10 It requires, as I started this out, with a valuation  
11 of collateral on the date that the filing occurs and then some  
12 valuation thereafter, probably on the date of the motion that  
13 they made, to show that, you know, we used to have a million  
14 dollars and now we only have \$500,000 because this has been  
15 dissipated and we need that more protection around the million  
16 that we were supposed to have at the beginning. That's the  
17 standard.

18 So we don't agree -- I know we're on different -- sort  
19 of different levels here about what we're arguing. But why  
20 isn't the Oversight Board as PREPA's representative entitled to  
21 discovery into what we believe to be the correct standard to  
22 the extent that they have materials that reflect the value in  
23 dollar terms of the collateral that was securing their bonds?  
24 We should have it. If they say they have nothing, there's  
25 nothing, it's whatever you gave us, but we don't have anything



1 independent, then I think that the order that we were looking  
2 for, some indication that that will be where the record will  
3 be, and that will be the end of it.

4 But we don't believe -- because they've identified  
5 that -- and I apologize for repeating myself. But they've  
6 identified that this has some value, some probative value, they  
7 indicated, and the whole raison d'etre of loss reserves is to  
8 figure out how much collateral do you have and what other  
9 monies are you going to have to put on top of that so that you  
10 can satisfy your obligations. So it just seems -- it just  
11 seems inconsistent to us that the way they're valuing their  
12 loss reserves gives absolutely -- you know, no element of that  
13 has anything to do with how they're valuing their collateral.

14 THE COURT: Do you agree, though, that -- can I talk?  
15 Am I allowed to talk?

16 COURTROOM CLERK: They're just having --

17 THE COURT: Nobody can hear me? So exciting.

18 COURTROOM CLERK: So I think Chris is coming up.

19 THE COURT: All right. Well, we'll have to take a  
20 minute once he comes up. But do you agree that the  
21 declarations that were filed say that the value of the  
22 collateral is not part of the loss reserve?

23 MS. DALE: I think that very clearly they say that.

24 THE COURT: Okay.

25 MS. DALE: If you don't have any other questions, I

1 would either take a break until we have the audio fixed, or Ms.  
2 Stafford is ready to address the second part of the argument.

3 THE COURT: Actually, I want to continue this before  
4 we get to privilege. So let's do it that way. But why don't  
5 we wait one minute. I don't have anything that important to  
6 say, but they apparently want to hear me say it.

7 COURTROOM CLERK: Apologies.

8 THE COURT: Is he on his way?

9 COURTROOM CLERK: Yes, he should be.

10 MR. NATBONY: I'll await your signal, Your Honor.  
11 Thank you.

12 THE COURT: I think so. They can hear you. They can  
13 hear him?

14 COURTROOM CLERK: Yes.

15 THE COURT: So why don't you talk, and I'll wave at  
16 you.

17 COURTROOM CLERK: He's on his way up.

18 THE COURT: Might as well get started.

19 MR. DESPINS: I'm just wondering, Your Honor, the  
20 Committee is supporting the Board on this, so I'm happy to go  
21 after, but typically we would go --

22 MR. NATBONY: That's fine with me, Your Honor.

23 THE COURT: I thought you weren't talking.

24 MR. DESPINS: We filed an affirmative motion.

25 THE COURT: I'm not going to get there. If you want

1 to let him go --

2 MR. NATBONY: That's fine, Your Honor.

3 MR. DESPINS: Your Honor, I'll be very brief. Luc  
4 Despins with Paul Hastings on behalf of the Committee. The  
5 Committee supports the Oversight Board on this motion.

6 I think it's important to set the legal stage, and I  
7 think you started doing that, which is, to lift the stay, you  
8 either have to -- you have to show cause, which can include a  
9 decline in value of the collateral. But then there's kind of a  
10 preclusion issue, which is, if they're going after cause but  
11 not for diminution of value of their collateral, they have to  
12 say that and say, Your Honor, that's all we're doing. We're  
13 saying mismanagement. We're saying that the only thing that's  
14 important is mismanagement and we're going to put all our eggs  
15 in that basket, and that's okay. They can do that.

16 But if they also want to allege diminution of value of  
17 collateral then the question is if they have documents, and  
18 I'll get to whether they do or not, but if they have documents  
19 that show the value of collateral on the petition date, any  
20 diminution and increase since then, that is clearly is relevant  
21 and should be produced. What I think they're saying is that  
22 our documents really don't address that at all, so trust us on  
23 that, you don't need them. Well, that's not the way it's  
24 played. From a burden point of view, these loss reserve  
25 calculations are easy to produce. They're not voluminous.

1 They can limit them to professional eyes only. There are all  
2 sorts of protections they can get.

3 THE COURT: Let me just see, is whoever is listening,  
4 can you hear me now?

5 MR. DESPINS: It doesn't appear so.

6 THE COURT: I feel like I'm on my cell phone.

7 COURTROOM CLERK: They said not yet.

8 THE COURT: Not yet. You can continue.

9 MR. DESPINS: So basically I think I was done. The  
10 point is that if there's -- there's not the tremendous burden  
11 to produce this. They can get all sorts of protections against  
12 the disclosure of this, but clearly in a deposition of their  
13 expert, the Board will want to ask them, So tell me about these  
14 loss reserves. What is the implied diminution of value or not  
15 in there? And the expert can say, There is nothing in there  
16 about the value of collateral. I would find that bizarre, but  
17 that's possible.

18 But in terms of taking their declarations as gospel  
19 when the critical issue may be whether there's been a  
20 diminution or not in the collateral, I think we -- the court  
21 should not authorize that. But if they want to come up here  
22 and say, We're saying cause but not because of diminution of  
23 collateral, solely because there's mismanagement of this  
24 enterprise, then I think that they may be right, that we have  
25 no entitlement to see their loss reserves, but I don't think

1       that they will say that.

2               THE COURT: Well, we'll find out. But let me ask you  
3 also, do you agree that the declarations do say that the loss  
4 reserve does not involve an analysis of the collateral, the  
5 value of the collateral, of the diminution of value?

6               MR. DESPINS: I'll be candid, Your Honor. I looked at  
7 those declarations late last night. I think the intent of  
8 those declarations is that.

9               THE COURT: You're not pointing me to something that  
10 says I have concern about this.

11              MR. DESPINS: No, I cannot do that. But what I would  
12 say is that's for a deposition, these would be appropriate  
13 questions to ask them as to how is it that you're able to  
14 comply with your statutory duties to report on your net  
15 position, net of your collateral, and not have anything in  
16 there at all regarding the value of the collateral. That would  
17 be a fair question to ask.

18              Thank you, Your Honor.

19              MR. NATBONY: Thank you, Your Honor. And good  
20 afternoon. William Natbony on behalf of the insurers.

21              I just want to start because I think Your Honor has  
22 recognized this is a discovery motion. It's not a motion on  
23 the adequacy or the proof of the merits of the ultimate claims  
24 that will be decided by Judge Swain on the lift-stay motion.  
25 This is a discovery motion on a limited issue, and the insurers

1 have consistently told FOMB that any valuation documents they  
2 have in their possession were either produced or discussed in  
3 detail in the insurers' expert reports, including the ones that  
4 were served yesterday, or I might add, Your Honor, in PREPA's  
5 own possession, part of the collateral valuation here are  
6 revenues of PREPA, and PREPA's own documents that they have  
7 produced and that they have in their own possession have -- so  
8 part of it is what they already have and what they said to them  
9 they provided to us.

10 The insurers fully responded to the document requests  
11 and told them that there's nothing else to produce, but they  
12 want loss reserve information. And we've told them time and  
13 time again that the loss reserve information is either  
14 irrelevant because it doesn't contain the collateral valuations  
15 that they're looking for or that they're privileged.

16 What's happening I think here, Your Honor, is  
17 essentially they don't like the fact that they didn't see X or  
18 Y documents, and now they're trying to engage in basically a  
19 fishing expedition to try and get what is the most sensitive  
20 and essential financial information that an insurer has, which  
21 is these loss reserves.

22 THE COURT: Before we go there, though, counsel has  
23 argued that you've taken the position that it is somewhat  
24 probative, the loss reserves. Is it or isn't it?

25 MR. NATBONY: No, it's not probative to collateral

1 value at all. I mean, we've put in three declarations, Your  
2 Honor. And they are unchallenged, by the way -- I mean, by not  
3 only in any reply papers, which Your Honor noted, also here in  
4 the admissions before Your Honor. And these made very clear  
5 that the PREPA-based loss reserves were calculated without  
6 undertaking any valuation of PREPA's collateral. And if you  
7 look at the numbers and the other stuff that's in there, you  
8 don't get a collateral value from those numbers.

9 So their entire motion is basically based on  
10 speculation because they don't know how they calculated it. We  
11 as the insurers know, we've put in detailed declarations. So  
12 rather, as we've said to Your Honor and as we put in the  
13 declarations, these loss reserves are calculated by reference  
14 to percentage probabilities of various litigation and  
15 settlement scenarios that were developed in consultation with  
16 in-house and external counsel.

17 I won't go yet into the privilege issue because I know  
18 you want to deal with relevance first. But essentially, the  
19 only valuation that is going on here is outcomes in litigation  
20 and settlement. Not collateral value.

21 There really is no compelling need here for the FOMB  
22 to have these sensitive documents. When Your Honor asked them,  
23 What is it going to do for you, I mean, what you heard was, I  
24 really don't know. And I think the only compelling need here,  
25 Your Honor, is to avoid what would be a dangerous precedent of

1 requiring disclosure of this kind of particularly sensitive  
2 information without any real justification.

3           Loss reserve documents and information are sensitive  
4 information. To obtain these documents at this time would give  
5 the FOMB a rare and unprecedented peek at the inner workings of  
6 the innermost thoughts of the insurers and their counsel in the  
7 midst of litigation about probability of success, percentages  
8 of success, percentages of potential recovery, willingness to  
9 settle, possible settlement ranges. So you did hear someone  
10 say you could, you know, potentially put "For attorneys' eyes  
11 only," but this is the whole point. You don't want that  
12 information out there, you don't want that information,  
13 particularly because of the sensitivity of the issues. Other  
14 creditors participate in these proceedings.

15           So I think the short answer here is from the important  
16 perspective of relevance and proportionality alone, before even  
17 getting to the various privilege issues, the motion should be  
18 denied, and it should be denied because of the fact that the  
19 very documents that they admit that they're seeking have no  
20 relevance to the collateral value issue that they talked about.

21           THE COURT: So what is your response to the statement  
22 that says you're going to have to prove the collateral value at  
23 different dates?

24           MR. NATBONY: Well, the short answer here today is  
25 that's an issue for them to raise before Judge Swain in



1 whatever motion they want to make. It's not part of the  
2 discovery motion here. However, to go a step further, the  
3 documents that are talking about collateral, you've basically  
4 got several types of collateral. You've got the revenue  
5 stream. You've also got the covenants that we've talked about.  
6 Those are going to be legal issues, how do you prove them, how  
7 do you prove lack of protection or lack of adequate protection.  
8 Many of the documents that we have you've already put in an  
9 expert report that Your Honor looked at that talked about  
10 diminution, but you also have all these documents that PREPA  
11 themselves have produced. And these are documents that talk  
12 about revenue, they talk about expenses, they talk about  
13 revenue stream. But these aren't documents that are in our  
14 files that we have to produce. These are documents that are in  
15 their own files.

16 So when it comes to producing and when it comes to  
17 proving lack of adequate protection, when it comes to proving  
18 the existence of collateral on various different dates, we have  
19 that information through PREPA's own documents and through our  
20 experts. So we will be able to do it. The question is do we  
21 do it today? No. This is a discovery motion, Your Honor. And  
22 it's really limited on the loss reserve issue, and I urge the  
23 court to deny it.

24 THE COURT: So are you prepared to say that any  
25 presentation that you make in connection with the motions on

1 the value of the collateral would be limited to the documents  
2 in PREPA's possession or have been identified in the expert  
3 reports?

4 MR. NATBONY: Well, I'm not willing to stipulate to  
5 anything, Your Honor. I can say that we have told them time  
6 and time again, and I'll continue the representation, which is  
7 whatever documents we have with respect to the value of  
8 collateral we've either produced already, are either in PREPA's  
9 own possession or in the documents they've produced to us, or  
10 are part of expert reports.

11 THE COURT: Well, if you've produced them already in a  
12 mass of documents, I think you need to identify them as to  
13 which ones you believe reflect the value of collateral.  
14 Because what they're saying is you've produced none.

15 MR. NATBONY: Well, again, Your Honor --

16 THE COURT: I don't know.

17 MR. NATBONY: Again, we've produced schedules, we've  
18 produced a lot of documents that they've produced to us. But I  
19 can tell Your Honor and we've represented to them and will  
20 continue to represent that there's nothing else to produce,  
21 period.

22 So you've got a motion that by their own admission  
23 says what we're seeking here today are loss reserves, and  
24 you've got an admission that loss reserves, they don't know why  
25 they're asking for them. You also have three declarations that

1 say, okay, they're not related, it's not a valuation of  
2 collateral, has no valuations of collateral in them. That's  
3 the motion that's before Your Honor.

4 THE COURT: Well, the reason that they say they've  
5 brought it up is that you brought it up, that you're the ones  
6 that said, All right, we don't have anything but loss reserve  
7 documents, information, that could be he responsive, and we're  
8 not giving you that.

9 MR. NATBONY: Well, we never told them that loss  
10 reserve documents would be responsive. And just to correct the  
11 record, you know, what happened here is they said to us, We're  
12 not looking for loss reserve documents, we're not looking for  
13 your loss reserve documents, we don't want them, we don't want  
14 opinions of counsel, we don't want any mental impressions of  
15 what your counsel are advising you. And then when they looked  
16 at the production and they said, Okay, I don't really see  
17 anything that I like or that I want, so now let's go after loss  
18 reserves. So that's kind of what's happened.

19 So, you know, I think the answer of we brought it up,  
20 I'm not sure that's really the accurate record. But again, I  
21 will say everything that we've produced, you know, I mean,  
22 everything that we have with respect to the issues they've  
23 asked for, we have given them. There's nothing left to give.

24 THE COURT: All right. Then the other question that  
25 they raise was if you are required by law to set a loss reserve

1 that is your exposure less your collateral or that indicates  
2 that collateral is a relevant factor, how do you file loss  
3 reserve information without having the collateral?

4 MR. NATBONY: Thank you for your question, Your Honor.

5 THE COURT: I never know if that's a good statement or  
6 a bad statement.

7 MR. NATBONY: It's a fine statement. I have a  
8 response for you, Your Honor, and I have I think three points  
9 to make.

10 First, what we provided to the insurers and what  
11 they've attached as exhibits are aggregate reserves, not the  
12 PREPA-specific reserves that you're talking about. And the  
13 declarations that you have before Your Honor talk about the  
14 PREPA-specific reserves which are at issue here and how they  
15 are calculated. And in any event, they cite to I guess  
16 insurance law 6903(b)(1), and under that law, there's a  
17 specific definition of collateral.

18 And collateral, for the purposes of that provision, as  
19 I understand it -- and Your Honor, they just put this in their  
20 reply papers which we received on Friday, so this is my first  
21 opportunity to respond to that. But our understanding is when  
22 you look at section 6901(g), that defines collateral, it  
23 doesn't include bond collateral. It includes specific things  
24 like cash letters of credit and certain investments. So it's  
25 not to include things like rate covenants and pledges of

1 revenues.

2 But in any event, the bottom line is the loss reserves  
3 were calculated the way they were calculated. And the  
4 declarations that are before Your Honor remain unchallenged as  
5 to that process.

6 THE COURT: Okay.

7 MR. NATBONY: Thank you, Your Honor. I'll reserve on  
8 the privilege issues for a more appropriate time.

9 THE COURT: Thank you. Before you go, more  
10 representation from the movants.

11 MR. BEREZIN: Thank you, Your Honor. Again, Robert  
12 Berezin on behalf of National.

13 I just wanted to, on the relevance point, drive one  
14 thing home because Your Honor's first question to the Oversight  
15 Board's counsel was right on target, which was, what is the  
16 relevance of the loss reserves to collateral value. And  
17 counsel went on to explain exactly the way it's explained in  
18 their papers, that the Oversight Board views collateral as  
19 being exactly the net revenues that exist just before and then  
20 on the petition date, and then you need to show a diminution of  
21 that value to this date. And that is their view of collateral.

22 Okay. So when we say the word "collateral," I just  
23 want to be clear that that's what the Oversight Board is  
24 talking about. And the question is are the loss reserves  
25 relevant to that definition of collateral. That's what we're

1 here for. And the declarations are very specific that loss  
2 reserves do not cover a finite period of time, meaning the  
3 before, on the petition date to this point. They cover the  
4 entire life of the bonds. So interest and principal due over  
5 the entire life of the bonds. For National, the end point is  
6 2035.

7 So you take this huge number of all the insured bonds  
8 over their life, how much does PREPA owe over that whole  
9 period, interest and principal. And then we go through the  
10 process of deciding what do we think is going to happen in the  
11 Title III in the negotiations with the Oversight Board. Do we  
12 think we're going to have the deal that's been made public with  
13 the ad hoc bondholder group. Okay, that's a factor. Do we  
14 think -- how are we going to do before Judge Swain in the First  
15 Circuit and Supreme Court if it ever comes to that. What do we  
16 think? And we come up with it.

17 What they will never is see or derive in any way,  
18 shape or form from our loss reserves is how much did PREPA have  
19 in its bank accounts at a particular point in time because  
20 that's not what loss reserves are. And there's only one set of  
21 declarations before this court. They are sworn-to declarations  
22 by officers of these companies. They're detailed and specific.  
23 That ends the inquiry.

24 These loss reserves are irrelevant. And the harm and  
25 undue burden under proportionality is obvious. It will disrupt

1 and undermine the mediation process that has been established  
2 by this court. It will undermine the litigation process by  
3 giving unfair insight to the Oversight Board's lawyers exactly  
4 in the manner that the work product doctrine forbids. It is  
5 period, end of sentence, over before you ever get to privilege  
6 on that basis.

7 THE COURT: The only question that I have is, even if  
8 you don't accept the Oversight Board's definition of  
9 collateral, do you have a definition of collateral that is  
10 reflected in the loss reserves? Do you know what I mean?

11 MR. BEREZIN: Yes, yes, Your Honor. And the answer is  
12 no. Because in our view, as we've articulated in the expert  
13 reports and in our papers, we refer to something under PROMESA  
14 that referred to the special revenue provisions of PROMESA.  
15 And we believe that PREPA's -- the lien that PREPA granted in  
16 its revenues constitutes special revenues, and we believe that  
17 special revenues are special. They're different. Congress  
18 protected them specifically.

19 So unlike, as counsel has referred to, the tests that  
20 I think dicta, the First Circuit referred to, those are the  
21 traditional non-special revenue liens. For example, I'm a  
22 creditor. There's a debtor. I have a lien on their building,  
23 their apartment building or something. And the question is,  
24 well, how much is that lien worth on the petition date, how  
25 much is in the bank accounts if that's what's secured, and then

1 has it been diminished in value through mismanagement of the  
2 apartment building.

3           Very different animal when you're talking about  
4 special revenues because outside of special revenues, a secured  
5 creditor's lien is established. The value of that lien is  
6 established as of the date of the filing of the bankruptcy.  
7 Now, you can come back and maybe modify that value on the time  
8 of a plan of adjustment, but special revenue goes on ad  
9 infinitum. It's a totally different animal. So we have a  
10 totally different view of collateral. Loss reserves don't  
11 relate to them either. We're taking the total amount owed and  
12 then we're applying litigation and settlement calculus to  
13 figure out what the reserve amount should be.

14           THE COURT: Anybody else on this side of the room?

15           MR. WORENKLEIN: No. We're relying on Assured's and  
16 National's arguments.

17           MS. DALE: Well, we just think that it's pretty  
18 unbelievable that sophisticated insurers like this are telling  
19 us that they haven't valued the collateral themselves, but they  
20 certainly have said that in open court and in these  
21 declarations, and that is where this record will be.

22           I just wanted to raise the issue that counsel raised.  
23 We originally weren't looking for loss reserve information  
24 because, as I told you at the beginning, they said they would  
25 give us collateral valuation documents in response to document



1 request number 1. And then when we didn't have anything, we  
2 continued to press on that, and we said, Will you look for  
3 collateral valuation documents that -- sorry -- that relate or  
4 reflect actuarial accounting or other aggregate estimates of  
5 likely payouts. This was during the meet and confer process.  
6 And they said, yeah, yeah, we'll go search for them. We said,  
7 okay, go search for those and we'll pull back on the loss  
8 reserve information. And then they came back and said, well,  
9 there's nothing non-privileged. There's no non-privileged  
10 actuarial accounting or other aggregate estimates of their  
11 likely payouts on the PREPA bonds. So we came back to the loss  
12 reserves for that reason because we had thought maybe we could  
13 make some kind of deal.

14 The other tissue I would raise, Your Honor, is in the  
15 National declarant, Mr. Bergonzi's declaration at paragraph 21,  
16 I'm not going to read it because again this was redacted, but,  
17 Your Honor, I think you should take a look at Mr. Bergonzi's  
18 declaration in paragraph 21, in particular what has been  
19 redacted, because it seems to indicate that the information  
20 that at least National provides to the New York State  
21 Department of Financial Services does not include some of the  
22 privileged information that might be going into these scenarios  
23 and other ways that they develop this information. That's not  
24 then --

25 THE COURT: That's why I asked you what the number

1 would --

2 MS. DALE: Help. But I think a number would help us.  
3 It might give us some indication of where their -- they just  
4 told us that they think this is special revenue bonds and they  
5 have now some kind of lien, you know, into the future. Okay,  
6 that's new information. And so what -- you know, how are they  
7 valuing their liens into the future. I mean --

8 THE COURT: I don't think that's new information.

9 MS. DALE: Well, understood, Your Honor. Their  
10 argument has always been that they have the collateral -- the  
11 covenant package is part of their collateral. I didn't mean to  
12 suggest that that was like --

13 THE COURT: They have also said that it extends  
14 through time, the amount continues. It's not set as of the  
15 date of the filing. And I think, as counsel has just explained  
16 it, the loss reserves are in a generic way everything we could  
17 possibly owe, less, assuming that nothing is paid by PREPA and  
18 then how much can we get out of PREPA due to settlement options  
19 or fiscal plan options or whatever options they are, but  
20 they're not based on a fixed amount.

21 MS. DALE: Understood. But generally loss reserve  
22 information over time would be reflective of whether the entity  
23 thought they were over-collateralized or under-collateralized,  
24 and you can see changes in loss reserves as having an impact on  
25 collateral.

1           THE COURT: My guess is if PREPA was paying something  
2 over the time that that would be a valid argument, but given as  
3 of now they're not paying anything, I can't imagine that that's  
4 a factor that's changed other than settlement. I mean, that  
5 makes sense to me, I guess is what I'm saying. When they  
6 explain how they've set the loss reserves, it makes sense to me  
7 in the context of where we are, the Title III, the insurance  
8 world, whatever. And I haven't seen anything from your side  
9 that says this is a ridiculous way to do loss reserves. You  
10 know, I don't see it, and it sort of makes sense to me.

11           But I do hear you that says, Well, they should be  
12 limited in this world then. You know, we've asked for this six  
13 ways to Sunday. When it comes to the motion, we shouldn't be  
14 hit with a different calculation that we haven't seen in some  
15 form, right?

16           MS. DALE: Thank you.

17           THE COURT: I'll hear you on the privilege.

18           MS. DALE: Yes, thank you.

19           MS. STAFFORD: Good afternoon, Your Honor. Laura  
20 Stafford, and I'll be addressing the privilege and work product  
21 issues, including the privilege waiver.

22           I'll address three points. First, that the loss  
23 reserve documents that are at issue here are not privileged;  
24 second, that even if they were privileged, any privilege  
25 attached to them would have been waived; and third, that even

1 if privilege has not been waived, under the circumstances the  
2 privilege must bend to the Oversight Board's need for these  
3 documents.

4 And three privileges have been asserted here. I'll  
5 start with the bank examiner privilege, and I'll address it  
6 just briefly because it doesn't apply, frankly, to the vast  
7 majority of documents that are at issue. To date, the New York  
8 Department of Financial Services has decided not to assert that  
9 privilege, which means there's no viable claim that either  
10 National or Syncora's documents are subject to that privilege,  
11 and any documents that Assured submitted to New York but did  
12 not submit to Maryland would likewise not be protected by the  
13 privilege.

14 Maryland's assertion also does not bind the court, and  
15 the court owes no deference to that determination. So if the  
16 court chooses, you may override the Maryland assertion of  
17 privilege over any documents belonging to Assured which were  
18 submitted to Maryland.

19 Moving on to the attorney-client privilege, Your  
20 Honor, the insurers' own declarants admit that these loss  
21 reserve calculations serve primarily a business purpose, are  
22 required by law and have nothing to do with litigation or any  
23 threat of litigation. The insurers themselves acknowledge  
24 they're required to create these documents for submission to  
25 their regulators and for the creation of the insurers' own

1 balance sheets. As you saw in Appendix A to our motion, they  
2 are a regulatory requirement that the insurers have been  
3 obligated to prepare since well before the Title III case. And  
4 just because an attorney was involved in preparing them doesn't  
5 mean that a document prepared otherwise in the ordinary course  
6 of business is now a privileged document.

7 Furthermore, the insurer's submissions don't  
8 demonstrate that the documents submitted by the insurers to  
9 their regulators actually reveal anything about the substance  
10 of counsel's opinions or advice or reveal anything about the  
11 actual back and forth discussions with counsel, including  
12 counsel's own analyses.

13 And that's the point that my colleague was raising a  
14 few moments ago with respect to the declaration that National  
15 has admitted. It doesn't appear that certain information that  
16 National might argue is privileged was ever actually submitted  
17 to the regulators at all. In any event, I think you mentioned  
18 a couple of times that these appear to be numbers, and whether  
19 or not we think there's any probative value to those numbers,  
20 it's difficult for us to understand how a number could possibly  
21 disclose privilege.

22 THE COURT: I'm assuming you want more than the  
23 numbers if you could get it.

24 MS. STAFFORD: Of course, but we don't frankly  
25 understand what these documents are and what they look like.

1 And if they are simply numbers, then we certainly don't  
2 understand how they're privileged. If they're numbers and  
3 calculations, we're not sure we understand how those could be  
4 privileged either. But depending on what they are and what  
5 they look like, that may be something that Your Honor may need  
6 to look at in camera. We don't understand how, based on what  
7 they've described them to us as or what we understand them to  
8 be could possibly be privileged on their face.

9 THE COURT: Well, would you agree -- assume with me  
10 that it's a description that says, We think that the Title III  
11 will last X number of years based on advice of counsel, and we  
12 have the following four claims against PREPA, and as a result  
13 of which, we will recover X, Y and Z over the next 20 years.  
14 Let's assume that's what it looks like. How does that fit in  
15 with your argument on attorney-client?

16 MS. STAFFORD: Well, we still think these are prepared  
17 primarily for business purposes, and therefore simply because  
18 they include these discussions that doesn't convert them  
19 magically into privileged documents.

20 To the extent that there are actual -- and I think  
21 that's something that would be need to looked at in camera,  
22 whether there's any material in there that would potentially  
23 include any privileged material, but we do think that because  
24 these are business documents basically don't reflect that type  
25 of attorney-client privilege information.

1 I'll move on to the work product doctrine. That,  
2 again, the declarants concede that these business documents are  
3 required for regulatory purposes and are prepared as part of  
4 standard business functions. And they can't establish that  
5 these business-oriented documents are required -- which they  
6 are required to prepare for regulatory purposes were prepared  
7 in anticipation of or because of litigation.

8 And that gets us to the First Circuit's test for work  
9 product doctrine, which has been laid out in Textron, as we  
10 mentioned in our papers. In order for the work product  
11 doctrine to attach, a document must be prepared because of  
12 litigation. It can't be a document that serves primarily a  
13 business function. And these documents are simply not prepared  
14 for any sort of litigation purpose. They're prepared for a  
15 regulatory purpose, as we discussed. And frankly, they would  
16 be required, if there had been no Title III filing, if there  
17 had been no automatic stay, they would still be obligated to  
18 create these same loss reserve documents that we seek.

19 THE COURT: Do you think the standard under the First  
20 Circuit is different than other places? Do you think Textron  
21 is different?

22 MS. STAFFORD: I do think it's different than some of  
23 the other cases they cited in their brief that found that those  
24 loss reserves may be work product protected, and I think in the  
25 First Circuit where this because-of test is required, the

1 documents that are created for the purpose of litigation can  
2 have a work product protection, but documents that are prepared  
3 to serve a business function, such as the tax reserves that  
4 were at issue in Textron, are very similar to the documents  
5 that are at issue here, where these documents are being  
6 prepared for the purpose of a business function, for the  
7 purpose of meeting a regulatory requirement, setting aside  
8 money that will be disclosed on balance sheets to investors as  
9 well.

10 So moving on to the issue of waivers, as the second  
11 issue I was planning to discuss. Notwithstanding any of these  
12 issues as to whether or not a privilege applies, the insurers  
13 waived any privilege they might have over these documents by  
14 sharing their loss reserve materials with third parties, here,  
15 the regulators.

16 With respect to the attorney-client privilege, it's of  
17 course black letter law that privilege waiver occurs when a  
18 privileged communication or document is disclosed to a third  
19 party. Disclosure of these alleged privileged materials is  
20 totally inconsistent with maintenance of attorney-client  
21 confidentiality. And I think this goes back to the question  
22 you were asking earlier about whether or not, if we assume that  
23 these materials include some sort of analysis of the outcome of  
24 Title III litigation, how many months or years it may last,  
25 even if that did include some amount of privileged material, by



1 disclosing it to their regulators that privilege was waived.

2 And the same goes for the work product doctrine,  
3 which, disclosure of these loss reserves to the regulators also  
4 waives their privilege. Work product protection is waived if  
5 disclosure substantially increases an opportunity for a  
6 potential adversary to obtain information. And that's exactly  
7 what happened here.

8 These materials, by being disclosed to the regulators,  
9 are exposed to a number of potential adversaries, at least the  
10 insurance regulators themselves are potential adversaries,  
11 particularly the case with respect to the New York regulator  
12 who has apparently declined to assert the bank examination  
13 privilege.

14 And second, documents held by the New York Department  
15 of Financial Services are subject to the New York Public  
16 Officers Law's general policy that public documents shall be  
17 available for public inspection and copying.

18 THE COURT: Well, they argue that they would fall  
19 within an exception.

20 MS. STAFFORD: They argue that they would, but there's  
21 no evidence to indicate that they actually would -- that if a  
22 public record request was filed, that they would actually be  
23 entitled to that protection. They don't make out an argument  
24 anywhere in their papers that these are trade secret documents  
25 that would be protected from disclosure.

1           So I'll move on to my final point, which is that even  
2 if Your Honor decides that these documents are privileged and  
3 that the privilege was not waived, the work product protection  
4 should be overcome. And this really takes us back to the  
5 issues that we were talking about earlier.

6           This is -- the insurer's calculation of collateral  
7 value is really in our view key to the lift-stay motion. And  
8 according to the insurers, the only documents in existence that  
9 they have that address how they value their collateral are the  
10 loss reserve calculation documents. If they don't have  
11 anything but these loss reserve documents and they won't  
12 produce them, in our view that in and of itself is a basis to  
13 deny the motion.

14           So in our view, we have a compelling need for this  
15 information simply because we have no other way of  
16 understanding how they are valuing their collateral. We are  
17 entitled to have some understanding of what they're doing to  
18 value that collateral.

19           So the only alternative in our view is that if these  
20 are the only documents they have and they won't let us have  
21 access to them, then we think the proper course, Your Honor,  
22 would be to preclude them from attempting to proffer evidence  
23 of the value of their collateral on the petition date and  
24 seeking to justify lifting the stay. Unless you have any  
25 further questions --

1 THE COURT: Thank you. Not yet. Mr. Despins, do you  
2 want to be heard on privilege?

3 MR. DESPINS: Not on this issue, Your Honor. Thank  
4 you.

5 MR. NATBONY: Thank you, Your Honor.

6 So Mr. Berezin will handle attorney-client privilege.  
7 I'm going to handle, if it's all right with Your Honor, work  
8 product and the bank examiner privilege and the waiver on work  
9 product.

10 So again, it's unchallenged here that the loss reserve  
11 information is directly tied to and the result of input from  
12 in-house and outside attorneys concerning litigation risk and  
13 settlement possibilities. The fact that PREPA-related reserves  
14 may also serve a business purpose is really of no consequence  
15 because as the cases have recognized, including Textron and at  
16 least three other cases in the district of Puerto Rico since  
17 Textron, the Westernbank case, the Mullins case, and W. Holding  
18 case, each of those talks about documents having the ability to  
19 have dual purposes.

20 And in fact, when you're talking about loss reserves,  
21 when you suddenly come into a process where there is  
22 anticipated litigation or actual litigation, and this has been  
23 going on at least since 2014 when there was anticipated  
24 litigation over PREPA's looming defaults and repudiation of its  
25 payment obligations, but certainly since 2017, which is when

1 they're asking for these documents, there has been anticipated  
2 litigation, you know, so that the reserves themselves, when  
3 they are calculated even by reference to the litigations, must  
4 be being prepared in anticipation of litigation.

5 So when you're talking about 10 percent, 15 percent of  
6 success probability, when you're talking about what is the  
7 percentage possibility of RSA being moved forward, what is the  
8 possibility of settlement negotiations and settlement ranges,  
9 so I think if you look, Your Honor, at the Schreib case in  
10 particular, and that's cited at page 20 of our brief, that is  
11 consistent with Textron and Westernbank and all the other cases  
12 that say, even if you've got a document that let's say serves a  
13 business purpose, when you've got that litigation or that  
14 anticipated litigation that comes your way, the purpose of the  
15 document essentially changes. And when you look at -- you  
16 know, when you're talking about loss reserves that are actually  
17 referring to the litigations, you know, that in our view means  
18 that it's not the same document in essentially the same form  
19 that it was before because it now, by necessity, has to account  
20 for the changed circumstances.

21 THE COURT: Textron dealt with handing the IRS the  
22 blueprint for how to sue them, right?

23 MR. NATBONY: Except -- I'm sorry, Your Honor. Go  
24 ahead.

25 THE COURT: No. So distinguish this from Textron.

1 MR. NATBONY: When you read Textron, it's very clear  
2 that the court found that there was no evidence of litigation  
3 purpose within the documents, and there was no actual or  
4 threatened litigation at the time. That's very different than  
5 what you have here.

6 Here you've got a situation where you have clearly  
7 anticipated litigation because of PREPA not meeting its  
8 obligations. And then of course since 2017 and since the Title  
9 III, you have actual litigation. So that I think is the  
10 difference. And even Textron admits that there can be  
11 instances when you have dual purposes. But they didn't find it  
12 there. They didn't find it. They clearly found a lack of  
13 evidence and no evidence. You certainly have no evidence --  
14 you certainly don't have no evidence here.

15 So if I may turn to waiver, Your Honor, at least as to  
16 work product, the First Circuit is pretty clear in Blattman,  
17 and I don't think there's any dispute as to the standard. My  
18 colleague talked about work product protection being waived  
19 only when disclosure substantially increases the opportunity  
20 for potential adversaries to obtain the information. We agree  
21 with that standard.

22 But here, the information wasn't provided to an  
23 adversary as part of any adversary proceeding or with any  
24 anticipation that the regulators would disclose such  
25 information to any third parties. In fact, it was the

1 opposite. Instead, confidentiality was ensured by law.

2 Now, they don't talk about the Maryland statute, but  
3 of course the Maryland statute on its face is crystal clear.  
4 No subpoena, no FOIA, nothing, that the documents that are  
5 there are going to be preserved in confidence. And in New  
6 York, we've obviously put before Your Honor the trade secret  
7 exception. But one thing they haven't addressed, the other  
8 side, is section 1504(c) of the insurance law, which was in all  
9 three declarations before Your Honor, ignored by them in their  
10 brief, in their reply brief. But that basically prohibits  
11 disclosure by the New York Department of Financial Services of  
12 reports without prior written consent of the regulated insurer.  
13 And there are exceptions for public policy, but the regulators  
14 have never, you know, in the pattern exercised that  
15 prerogative.

16 So when you talk about the Maryland statute, which is  
17 2-209 for Assured, when you talk about the trade secret  
18 exception in New York and section 1504(c) of the insurance law,  
19 you know, these prevent disclosure by the regulatory agencies.  
20 Plus, the insurers here have also expressly and affirmatively  
21 preserved confidentiality in a number of ways. When they  
22 provide the documents, as the declarations indicate, they will  
23 put legends on it and things like that about the  
24 confidentiality. And also there's an expected confidentiality  
25 that each of the insurers has attested to based on the pattern

1 of dealing with the regulators over time.

2 So here, there is no evidence that the insurers  
3 anticipated, expected or affirmatively anticipated any  
4 disclosure by the regulators and, in fact, reasonably and based  
5 on the law of the states, had an appropriate belief that there  
6 would be no disclosure.

7 THE COURT: Do you distinguish between the actual  
8 numbers and the analysis? I'm envisioning that what you do is  
9 you submit to the regulator some explanatory material, and it  
10 varies among the different insurers. But does your argument on  
11 work product distinguish between the actual number and an  
12 explanation?

13 MR. NATBONY: It does not. It applies to both the  
14 number and to any explanatory materials, for a specific reason.  
15 And as Mr. Berezin said, when you look at what we're talking  
16 about for loss reserves, that is, right, taking a number that  
17 says, okay, this is the potential payment stream, and we're  
18 going to, let's say the payment stream is a billion dollars,  
19 all right? And the reserve is 500 million. Well, what does  
20 that tell you? They know what the potential amount is of the  
21 liability. They have the insurance policies. They have the  
22 schedule of payments. So all of a sudden they don't -- it's  
23 not as if the number doesn't tell them anything. It does. All  
24 of a sudden they've got a number of 50 percent there. So that  
25 tells them, okay, well, their mindset is at 50 percent. So

1 they're still able to peer into the thoughts of why is it 50  
2 percent and not 60 percent? Why is it 50 percent and not 40  
3 percent? So no, I don't make a distinction between the two.

4 Lastly, Your Honor, just on the bank examiner  
5 privilege, at least with respect to Assured and Maryland, they  
6 don't spend much time on that and I think rightly so. Maryland  
7 has clearly done so, clearly asserted the privilege.

8 THE COURT: Do you agree, though, that it's the  
9 examiner's privilege?

10 MR. NATBONY: That is what the law says, Your Honor.

11 THE COURT: And New York has not asserted it.

12 MR. NATBONY: They have chosen not to become involved  
13 in this proceeding.

14 THE COURT: I understand that's what they do.

15 MR. NATBONY: I would -- I would hesitate to say that  
16 they -- you know, they have affirmatively said they are not  
17 asserting any privilege, because I think that's different, but  
18 they have chosen not to become involved in this proceeding at  
19 this time. Different than Maryland. And of course the reason  
20 for the bank examiner privilege is so that insurers can be  
21 encouraged to engage in a free and candid exchange of  
22 information. That should not be disturbed here, Your Honor.

23 THE COURT: All right. But you can't assert that on  
24 behalf of New York?

25 MR. NATBONY: No, Your Honor, I cannot.



1 THE COURT: Thank you.

2 MR. NATBONY: Thank you, Your Honor.

3 MR. BEREZIN: Thank you, Your Honor. Robert Berezin  
4 again for National Public Finance Guarantee.

5 I'm just going to briefly cover internal documents.  
6 We haven't talked about that that much. And it's never really  
7 been clear to me whether the Oversight Board is seeking  
8 internal documents or just the documents that were disclosed,  
9 but I thought it was worth mentioning just in case they are.  
10 Every argument we've made so far today about why the  
11 external -- what I'll call external reserve documents shouldn't  
12 be produced apply equally as to the internal documents, and  
13 that goes to the waiver issue.

14 So for attorney-client privilege, to the extent that  
15 there are -- not every single document, internal reserve  
16 document is covered by the attorney-client privilege, but for  
17 those that reflect communications from counsel, those would be  
18 privileged, attorney-client privileged. There's no exception  
19 to the attorney-client privilege. There's no weighing of it.  
20 It's absolute.

21 THE COURT: Let me just understand the record, though.  
22 You are not claiming the privilege on internal documents  
23 reflecting the value of collateral?

24 MR. BEREZIN: No, no, Your Honor. I'm talking about  
25 loss reserves.

1 THE COURT: So this argument goes to the loss reserve.

2 MR. BEREZIN: I'm sorry, Your Honor. Absolutely.

3 Loss reserves. We do not have documents reflecting the value  
4 of the revenues. I'm talking about the internal documents.

5 No. This relates to loss reserve documents.

6 THE COURT: And you're not claiming privilege on any  
7 such documents that reflect the collateral? You're not  
8 withholding documents?

9 MR. BEREZIN: Absolutely not, Your Honor. To the  
10 extent that we have documents that reflect the value of  
11 collateral, those documents would have been produced. I think  
12 the issue here is that they would like to see the amounts that  
13 existed as of the petition date, how much revenue is in there.  
14 And we don't have those documents. Certainly it makes sense  
15 that we wouldn't be permitted to suddenly spring on them  
16 documents from our files showing amounts of net revenue or  
17 revenue that PREPA had on the petition date. We don't have  
18 those documents or we would have produced them. Or we do have  
19 them, they provided them to us, and they're part of the agreed  
20 record.

21 So it's as far as our own internal documents, we do  
22 not have them. We did not create documents showing PREPA's  
23 revenue or net revenue on a certain particular date. And if we  
24 did, we would have produced them.

25 So back to the attorney-client privilege or internal

1 documents, those documents are privileged, and they should  
2 remain attorney-client privileged. There's no question about  
3 that. As far as waiver -- the same arguments apply on the work  
4 product that counsel made, again, putting aside work product,  
5 proportionality, it's just a no-brainer that these kinds of  
6 documents, internal documents that reflect loss reserves should  
7 not be subject to production.

8           The one thing special on the work product side, and I  
9 guess the attorney-client side, is that they weren't -- these  
10 are internal documents. They by definition weren't disclosed  
11 to anyone. So there's really no argument at all for waiver.  
12 The one argument you see or hear I think a little today and in  
13 their papers is sort of an at-issue waiver argument. And that  
14 is sort of sprinkled in there. And I think the argument goes  
15 something like, Well, you've brought this motion to lift the  
16 stay. We believe that such a motion would be denied on its  
17 face if you can't show a dollar value in bank accounts. You're  
18 not producing those documents, and therefore you -- and you may  
19 have some documents that don't relate to that but relate to  
20 loss reserves. That's an at-issue waiver. You put those  
21 documents at issue.

22           Clearly we have never put our loss reserves at issue.  
23 We've never cited them. We've never discussed them. We've  
24 never referenced them, and we never will. So they were not put  
25 at issue.

1           And as far as the subject matter waiver, there's no  
2 shield/sword disclosure going on here. Again, because we  
3 haven't put loss reserves at issue, they do not have anything  
4 to do with collateral the way they view it or the way we view  
5 it, and therefore there's no at-issue waiver or any other type  
6 of waiver.

7           THE COURT: Are you claiming attorney-client for the  
8 documents that were produced to the regulators, as opposed to  
9 work product?

10          MR. BEREZIN: I don't believe so, Your Honor. I  
11 believe work product.

12          THE COURT: I was having a hard time on that one.

13          MR. BEREZIN: That's work product, Your Honor.

14          THE COURT: He's passing you notes. Do you want to  
15 read them?

16          MR. NATBONY: Thank you for your help, Your Honor.

17          MR. BEREZIN: I will state for the record that  
18 counsel --

19          THE COURT: Hope you write clearly.

20          So let me tell you where I am. I think the privilege  
21 issues are quite difficult here, actually. And I don't have an  
22 easy answer to them. I don't think -- I think as the record  
23 now stands that there's no evidence that any documents have  
24 been withheld that relate to the value of collateral. I think  
25 that the movants have established that the loss reserves do not

1 reflect in any way the value of collateral. So I'm going to  
2 duck the other issues because I don't think I need to reach  
3 them.

4 But that having been said, we should make sure that  
5 the record is clear so that you don't get to the motion stage  
6 and there are documents that people are fighting about. So  
7 does it make sense -- and this is a dialogue, all right -- does  
8 it make sense to enter an order that says: One, if it hasn't  
9 been produced, you can't use it in connection with the pending  
10 motions. And I think that's sort of a given. If it hasn't  
11 been identified or produced without good cause, you can't use  
12 them in connection with the motion; and two, does it make sense  
13 to say to the movants you have to -- to the extent that you are  
14 depending on any documents, internal documents to establish the  
15 collateral value, you identify them, even if you've produced  
16 them already.

17 I'm not asking you to go through and say which of the  
18 PREPA documents, but if your documents are relevant to  
19 establishing collateral value, I think they ought to be  
20 identified somewhere along the line here and not be just buried  
21 in a stack of documents.

22 So let me ask PREPA. Does that help narrow or at  
23 least define the record, Mr. Despins?

24 MR. DESPINS: Briefly, Your Honor. I just want to say  
25 that the Committee's view on this is as follows: Of course

1 they won't use the documents they don't want to produce because  
2 they don't want to produce them because they're bad. If you  
3 believe them, they are relevant. But it's very important to  
4 understand, there's been no probing of this. They give us  
5 declarations. How -- is there a deposition of these  
6 declarations? No, there's no deposition. So we're taking the  
7 declaration as face value. And based on that, we're excluding  
8 all those documents. So to us, the remedy of saying they won't  
9 be able to use those documents is not really the right remedy.

10 THE COURT: You haven't challenged the veracity of  
11 these in any way.

12 MR. DESPINS: How could we, Your Honor? Because we  
13 don't have the loss reserves -- they're talking about a  
14 document we don't have. There's no --

15 THE COURT: So nowhere in these papers do you request  
16 a deposition. Is that what you're asking for?

17 MR. DESPINS: As far as the Committee is concerned, we  
18 didn't see the unredacted version of these declarations until  
19 last night because we've been asking for them for a while now  
20 and they refused to produce them to us until last night, so  
21 that's why we couldn't ask for anything. But it is bizarre to  
22 say that no evidence has been produced. How can we produce it?  
23 We don't know what the documents say. There's no ability to  
24 question --

25 THE COURT: I'm sorry. You don't have the unredacted

1       declarations?

2               MR. DESPINS:   They had them.

3               THE COURT:    They do.

4               MS. DALE:     We do.

5               MS. DESPINS:   But we didn't.

6               THE COURT:    Well, you didn't read them until last  
7       night anyway.

8               MR. DESPINS:   That's because they were not provided to  
9       us until last night, Judge.

10              THE COURT:    I will say if PREPA had them --

11              MR. DESPINS:   Okay.   But I just -- to have the remedy  
12       that those documents will not be used by them is really not --

13              THE COURT:    I hear you.

14              MR. NATBONY:   Might I make the following suggestion,  
15       Your Honor?   That the parties take Your Honor's comments and  
16       try to negotiate an order to present to Your Honor.   And if we  
17       can't, then we'll --

18              THE COURT:    Does that help or hurt?

19              MS. DALE:     I'm happy to try to do that, Your Honor.

20              THE COURT:    Okay.   And let me ask you this -- and do  
21       you need a detailed written order on this?   If you need me to  
22       write something complicated because you plan on appealing it,  
23       let me know.   Otherwise, I'm just going to stick on the  
24       record --

25              MS. DALE:     We will let you know.   We will let you know

1 very quickly if we need something more. And can we just have a  
2 timeline in which we'll try to do this and get back to the  
3 court? Because we have depositions actually starting soon. So  
4 can we do that by the end of the week, or Monday?

5 MR. NATBONY: Yes.

6 MS. DALE: End of the week, Your Honor?

7 THE COURT: That would be fine.

8 MR. NATBONY: And I'm presuming we'll be able to work  
9 something out. If not, we'll let Your Honor know and submit --

10 THE COURT: If not, submit your separate versions, and  
11 I'll do something.

12 MR. NATBONY: Thank you, Your Honor, very much.

13 THE COURT: Okay. Is there anything further?

14 MS. DALE: Not for me, Your Honor.

15 THE COURT: Safe travels, everyone.

16 MR. NATBONY: Thank you, Your Honor.

17 (Adjourned, 3:22 p.m.)  
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CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 27th day of February, 2019.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter